

## CLUSTER INTRODUCTION:

# INDIGENOUS POPULATIONS AND INJUSTICE'S GLOBAL BORDERS

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### I. INTRODUCTION

In this twenty-first century, the violence and injustices first visited upon Indigenous Peoples some six centuries ago continue to be played out globally.<sup>1</sup> Across the Americas, to the settler colonies of the

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1. There is no official definition of "Indigenous Peoples." However, Special Rapporteur José Martínez Cobo offered a preliminary survey in his 1983 report for the U.N. Commission on Human Rights. Special Rapporteur, U.N. Commission on Human Rights, *Study of the Problem of Discrimination Against Indigenous Populations*, U.N. Doc. E/CN.4/Sub.2/1983/21/Add.8, ¶ 379 (Sept. 30, 1983), available at [http://www.un.org/esa/socdev/unpfii/documents/MCS\\_xxi\\_xxii\\_e.pdf](http://www.un.org/esa/socdev/unpfii/documents/MCS_xxi_xxii_e.pdf). Martínez Cobo defined Indigenous Peoples as

those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.

*Id.* The definition of an Indigenous Person was expanded in 1986 to include any individual who identified himself or herself as Indigenous and was accepted by the group or the community as one of its members. See Special Rapporteur, U.N. Commission on Human Rights, *Study of the Problem of Discrimination Against Indigenous Populations, Volume 1*, U.N. Doc. E/CN.4/Sub.2/1986/7 (Jan. 1, 1986); Special Rapporteur, U.N. Commission on Human Rights, *Study of the Problem of Discrimination Against Indigenous Populations, Volume 2*, U.N. Doc. E/CN.4/Sub.2/1986/7/Add.1 (Jan. 1, 1986); Special Rapporteur, U.N. Commission on Human Rights, *Study of the Problem of Discrimination Against Indigenous*

British Commonwealth, and to the European outposts in Africa and the Middle East, we see a consistent theme of dispossession, forced labour, and the original genocidal violence that Denise Ferreira da Silva has so appropriately framed as the “logic of obliteration.”<sup>2</sup> In the present, the same colonial modalities continue to be played out in several situations around the globe.<sup>3</sup> Yet it should be stressed that the battle of Indigenous Peoples in the postcolonial moment is not solely concerned with questions of land and cultural heritage—although these questions remain central to so many of the issues that concern them. There are also questions of the place of the Indigenous “Other” within the nation and how claims for recognition continue to be challenged.<sup>4</sup> The battle to protect Indigenous land, culture, and languages—with the attendant threats of bio-prospecting and knowledge exploitation—is a global concern. In these multiple sites of struggle and contestation, there are moments, however, where

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*Populations, Volume 3*, U.N. Doc. E/CN.4/Sub.2/1986/7/Add.2 (Jan. 1, 1986); Special Rapporteur, U.N. Commission on Human Rights, *Study of the Problem of Discrimination Against Indigenous Populations, Volume 4*, U.N. Doc. E/CN.4/Sub.2/1986/7/Add.3 (Jan. 1, 1986); Special Rapporteur, U.N. Commission on Human Rights, *Study of the Problem of Discrimination Against Indigenous Populations, Volume 2, Conclusions, Proposals and Recommendations*, U.N. Doc. E/CN.4/Sub.2/1986/7/Add.4 (Jan. 3, 1987). Significantly, the U.N. Declaration on the Rights of Indigenous Peoples does not provide a definition of Indigenous Peoples, although there is reference at Article 33 to the importance of self-identification. U.N. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295, at Art. 33 (Oct. 2, 2007). Neizen makes the point that the term itself is little more than three decades old but observes that “[t]he term ‘indigenous’ invokes the idea of a community or society pursuing a timeless way of life, the first occupants of remote, wild territories living simply with the use of basic technology.” Ronald Neizen, *The Indigenous Claim for Recognition in the International Public Sphere*, 17 FLA. J. INT’L L. 583, 587 (2005).

2. DENISE FERREIRA DA SILVA, TOWARD A GLOBAL IDEA OF RACE 155 (2007).

3. Examples of this include the forced removal of Indigenous Peoples to make way for the Belo Monte Dam in Brazil, the state of emergency declared in Peru against indigenous communities protesting against mining development on their land, the appropriation of First Nations’ lands in Alberta, Canada to provide access to tar sands, and the destruction of cultural heritage sites of aboriginal peoples on the Burrup Peninsula in Western Australia

4. See Dominique Legros, *Indigenous Peoples’ Self-Determination and the Broken Tin Kettle Music of Human Rights and Liberal Democracy*, 16 FLA. J. INT’L L. 579 (2004); Daniel Bonilla, *The Principle of Political Unity and Cultural Minorities Self-Government*, 17 FLA. J. INT’L L. 525 (2005).

Indigenous rights have been asserted in ways that would not have been possible even in the latter part of the last century.

In 1999, Siegfried Wiessner offered an initial survey of the possible intersections and partnerships that could be fostered between LatCrit scholarship and the Indigenous Peoples of Latin America.<sup>5</sup> In his review, Wiessner specifically expressed concern at the violence directed against the Indigenous Peoples of Brazil, but sounded a note of cautious optimism for the developments taking place in Columbia, Venezuela, and Ecuador, and for the “difficult road” ahead for the Zapatista (*Ejercito Zapatista de Liberación Nacional (EZLN)*) movement in Mexico.<sup>6</sup> He concluded by acknowledging the increasing awareness of the special spiritual bond that Indigenous People have with their traditional lands, calling for some form of recognition for Indigenous autonomy and urging the development of international remedies.<sup>7</sup> In the intervening period since Wiessner first issued a clarion call to LatCrit scholars to take up the struggle in Indigenous issues, there have undoubtedly been a range of heartening developments.

At the international level, for example, we have witnessed the ratification of the U.N. Declaration on the Rights of Indigenous Peoples in 2007, which has been signed by all Latin American nations.<sup>8</sup> Certainly the election of Evo Morales, the Indigenous leader of the Movement Towards Socialism Party in 2005, and the subsequent amendments made to the Bolivian Constitution in 2009 recognizing the rights of the Indigenous population were developments that Wiessner could not have contemplated when he

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5. See Siegfried Wiessner, *Esa India! LatCrit Theory and the Place of Indigenous Peoples Within Latina/o Communities*, 53 U. MIAMI L. REV. 831 (1999).

6. *Id.* at 851.

7. *Id.* at 851-52.

8. See U.N. Declaration on the Rights of Indigenous Peoples, *supra* note 1. For a list of all nations who have signed the Declaration, see Press Release, General Assembly, General Assembly Adopts Declaration on Rights of Indigenous Peoples: ‘Major Step Forward’ Towards Human Rights For All, Says President, U.N. Press Release GA/10612 (Sept. 13, 2007), available at <http://www.un.org/News/Press/docs/2007/ga10612.doc.htm>. The only Latin American nation that failed to ratify the Declaration at the vote on September 13, was Columbia, which chose to abstain. However, in April 2009, Colombia ratified the Declaration. Briefing Notes, U.N. Human Rights Commission, Colombia’s Support for UN Declaration on Indigenous People Welcomed (Apr. 24, 2009), <http://www.unhcr.org/49f1bc356.html>.

wrote his article some ten years earlier.<sup>9</sup> In the ensuing period, there have been achievements in Bolivia, including the consolidation of eleven million hectares of land under the legal concept of legal common land.

Despite these advances, concerns remain about the conditions that Indigenous Peoples throughout Latin America continue to endure, evidenced in both the reports of James Anaya, the Special Rapporteur on Indigenous Peoples,<sup>10</sup> and also the annual reports of NGOs such as the International Work Group for Indigenous Affairs (IWGIA).<sup>11</sup> In recent years, the increased pressure to obtain access to the resources and land of Indigenous communities for mining, farming, or the construction of major works (such as dams) has led to an escalating cycle of violence.<sup>12</sup> Elsewhere, the removal and dispossession of Indigenous populations does not always allow for such legal niceties, a fact attested to by the number of reports of the murder of Indigenous leaders and their supporters fighting to protect their traditional lands.

9. See Roberto Albro, *Confounding Cultural Citizenship and Constitutional Reform in Bolivia*, 37 *LATIN AM. PERSP.* 71-90 (2010); Denise Ferreira da Silva, *An Outline of a Global Political Subject: Reading Evo Morales' Election as a (Post) Colonial Event*, 8 *SEATTLE J. SOC. JUST.* 25 (2009).

10. See, e.g., Rep. of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, James Anaya: Addendum, U.N. Doc. A/HRC/12/34/Add.2 (Aug. 26, 2009); Rep. of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, James Anaya: Addendum, U.N. Doc. A/HRC/12/34/Add.6 (Oct. 5, 2009); Rep. of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, James Anaya: Addendum, U.N. Doc. A/HRC/15/37/Add.3 (May 25, 2010).

11. See generally *THE INDIGENOUS WORLD 2011* (Kathrin Wessendorf ed., Int'l Work Grp. for Indigenous Affairs 2011).

12. For example, in Columbia, where one-third of the national territory is designated as Indigenous reserves, there is increasing pressure by oil and mining companies and farming interests, seeking access to the land. In Venezuela in 2010, members of the Yanomami people from Amazonia state suffered fatalities in conflict with illegal miners (*garimpos*) attempting to appropriate their lands. In Paraguay in September 2010, the Yvyraijo Indigenous community were driven away from their 1200 hectares land holding. In Chile, there has been forced evictions of the Indigenous population of Rapa Nui (Easter Island). Elsewhere in that nation, the government has facilitated increased expansion of mineral companies into Indigenous lands through legislative enactment. Similarly, in Peru, Bill of Law 3817 to amend an existing law on Internal Displacement will allow for the forced removal of communities where it is in the interests of the nation.

While international instruments or the enactment of specific legislation hold the promise of increased recognition of Indigenous rights, the reality of implementation and observance is less promising. In this context, it is perhaps apposite to return to the comments of Wiessner, who observed that “LatCrit, in its quest for authenticity, equal dignity, and removal of all vestiges of colonialism and oppression, is a most valuable ally in the struggle of [I]ndigenous [P]eoples.”<sup>13</sup>

## II. THE RELEVANCE OF LATCRIT THEORY FOR INDIGENOUS IDENTITY

In acknowledging how the law (at both domestic and international levels) can serve to both diminish and even erase the rights of Indigenous Peoples or, alternatively, provide an avenue for protection and redress, it becomes crucial to be able to critique the law’s operation. The work of LatCrit theory is vital for the possibility—as Montoya and Valdes put it—to offer a voice and disseminate suppressed knowledges in the furtherance of social justice.<sup>14</sup> With the distinctive and unique blend of an inter-generational, international, and interdisciplinary focus, LatCrit provides a means to challenge both the historical antecedents that gave rise to violence against Indigenous Peoples and the present hierarchies that seek to either perpetuate or re-install policies of violence, dispossession, and injustice.<sup>15</sup> For Ediberto Román, the effectiveness of LatCrit in engaging with the issues that confront Indigenous Peoples (and other marginalized racial and ethnic groups) is that the LatCrit movement is more than a means to theorize about how law affects Latinas/os.<sup>16</sup> It is an antiessentialist, antisubordination effort by progressive, oftentimes younger, legal scholars of color, to: (1) produce critical knowledge as a means to approach greater social justice; (2) challenge perceptions of reality concerning the identity of Latinas/os; and (3) cultivate coalition-building among Latinas/os, African Americans,

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13. Wiessner, *supra* note 5, at 852.

14. See Margaret E. Montoya and Francisco Valdes, “Latinas/os” and the Politics of Knowledge Production: LatCrit Scholarship and Academic Activism as Social Justice Action, 83 IND. L.J. 1197, 1222 (2008).

15. See *id.*

16. Ediberto Román, *LatCrit VI, Outsider Jurisprudence and Looking Beyond Imagined Borders*, 55 FLA. L. REV. 583, 586 (2003).

Asian Americans, Indigenous Peoples, feminists, queers, and other OutCrits.<sup>17</sup>

While recognizing the prospective scope of LatCrit and, as he puts it, “other OutCrits,” Román observed that the primary focus of scholarly work had been concerned with the effects of race in the United States.<sup>18</sup> Even allowing for an ideological commitment to coalition building with other outsider groups, the possibility that Indigenous issues have not been engaged with to any substantive degree was at least averred to by Wiessner as early as 1999. While applauding the work of Elizabeth Iglesias in extending the scope of LatCrit theory “as international and border-crushing,” Wiessner went on to question the oversight of a (then) recently published LatCrit bibliography that, despite inclusion of a range of related topics such as “intersectionality” and “Latino(a) essentialisms,” failed to acknowledge Indigenous issues.<sup>19</sup> This omission was problematic to Wiessner, given that many Latinas/os trace their biological descent from both Indigenous and European ancestors. The same question was also posed by Elvia R. Arriola when she asked what it means “for me to ‘decenter whiteness’ as the singular referent from which to study race relations so as to center interracial relations when my Mestiza identity is comprised of both white (Spaniard) and Native ([I]ndigenous) blood?”<sup>20</sup>

In a similar vein, Margaret Montoya points to the fact that, “as Latinas/os, we, like many colonized peoples around the globe, are the biological descendants of both [I]ndigenous and European ancestors.”<sup>21</sup> The thread through each of these observations from Arriola, Montoya, and Wiessner (who cites Montoya) offers a clear statement that a myriad of factors complicate the assertion and recognition of Indigenous identity(ies) in Latin America. One of these factors, shared by virtually all former colonial possessions, is the historical legacy which insisted upon the characterizing the

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17. *Id.*

18. *Id.* at 584.

19. Wiessner, *supra* note 5, at 837.

20. Elvia R. Arriola, *Foreword: March*, 19 CHICANO-LATINO L. REV. 1, 37-38 (1998).

21. Margaret E. Montoya, *Masks and Identity*, in THE LATINO/A CONDITION: A CRITICAL READER 37, 40 (Richard Delgado & Jean Stefancic eds., 1998).

Indigenous “Other” as either a savage or as being of deficient or limited intellectual capacity. This characterization formed the basis (as will be noted in the subsequent discussion of the cluster contributions) of the dispossession of so many Indigenous Peoples globally. The wholesale appropriation of Indigenous lands, based variously upon the doctrines of discovery or *terra nullius*, hinged upon characterizing the original owners as savages and heathens who could not be the possessors of any legal entitlement to the lands that they occupied. The historical legacy of this characterization has been the persistent belief that the Indigenous populations continue to be defined in terms of the “Other” who exists in a state of nature and have no place in the nation or, alternatively, must be assimilated.

The passing of the colonial period has not necessarily been accompanied by any transition to a more enlightened acceptance of Indigenous Peoples (although there are instances cited above) as argued by Jorge Contesse S. regarding the relationship between the *Mapuche* people and the Chilean State.<sup>22</sup> Historical prejudices continue to be uncritically recycled within the nation to maintain the myth of national unity and completeness. These prejudices are aligned with instances where the discourse of the savage or heathen Indigenous “Other” is introduced with a specific view to achieving their dispossession to give effect to neoliberal programs. The demand for natural resources or to access territories still held by Indigenous Peoples are prime examples of where the Indigenous “Other” has been characterized as primitive, incapable of inhabiting modernity and (by implication) being a citizen of the nation state.

An alternative narrative to presenting the Indigenous population as the savage “Other” has been to argue that they have in fact been absorbed within the “melting pot” of the nation.<sup>23</sup> This is a thesis most famously argued in Brazil by anthropologist Gilberto Freyre in his 1933 publication, *Casa Grande e Senzala*, which provided the

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22. See generally Jorge Contesse S., *The Rebel Democracy: A Look into the Relationship Between the Mapuche People and the Chilean State*, 26 CHICANA/O-LATINA/O L. REV. 131 (2006).

23. See generally José Antonio Mazzotti, *Creole Agencies and the (Post)Colonial Debate in Spanish America*, in COLONIALITY AT LARGE: LATIN AMERICA AND THE POSTCOLONIAL DEBATE 77-110 (Mabel Moraña et al. eds., 2008).

basis for that nation's still-enduring myth of racial democracy.<sup>24</sup> The central tenet of this theory is that racial discrimination is absent from the Brazilian nation due to the long history of miscegenation between the Portuguese colonisers and the Afro-Brazilian slaves. The broad acceptance of the theory was further entrenched by the manner in which social mobility was equated with the "whitening" of the national population. The virulence of the racial democracy thesis was predicated on an insistence upon the notion of race neutrality such that any reference to racism was viewed as "un-Brazilian."<sup>25</sup> The view that centuries of miscegenation have produced one nation of people where difference cannot be distinguished has been strongly challenged in recent years in Brazil, Peru, and Bolivia.<sup>26</sup> The tropes of cultural assimilation are incredibly resilient as Silvel Elías attests in his comment upon the conditions in Guatemala.<sup>27</sup> In that country he identifies a process of *ladinization* (which he defines as the coercive process to transform the Indigenous population into *ladinos* and *mestizos*) being driven by "the elite who consider that these people are hindering the country's modernization."<sup>28</sup>

In Mexico, the celebration of the vision of a *meztizo* race can be traced to the work of José Vasconcelos who published *La Raza Cósmica (The Cosmic Race)* in 1925.<sup>29</sup> Vasconcelos's vision was for a future fifth race in the Americas that would be a mix of all the races

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24. See generally GILBERTO FREYRE, *CASA GRANDE E SENZALA: FORMAÇÃO DA FAMÍLIA BRASILEIRA SOB O REGIME DA ECONOMIA PATRIARCAL [CASA GRANDE & SLAVES: FAMILY FORMATION BRAZILIAN ECONOMY UNDER PATRIARCHAL CONDITIONS]* (Rio de Janeiro 1980) (1933).

25. See generally Edward E. Telles, *Racial Ambiguity Among the Brazilian Population*, 25 *ETHNIC & RACIAL STUD.* 415-41(2002); Edward E. Telles, *Em retrospectiva: uma revisão das políticas de inclusão racial do Brasil após dez anos [A Retrospective: Looking Back a Decade Later on Brazil's Racial Inclusion Policies]*, 6 *DESIGUALDADE & DIVERSIDADE – REVISTA DE CIÊNCIAS SOCIAIS DA PUC-RIO*, 143-56 (2010) (Braz.).

26. See Felipe Arocena, *Multiculturalism in Brazil, Bolivia and Peru*, *RACE & CLASS*, Apr. 2008, at 1-21.

27. See Silvel Elías, *Guatemala, in* *INDIGENOUS WORLD 2011* 88-97 (Kathrin Wessendorf ed., 2011), available at [http://www.iwgia.org/iwgia\\_files\\_publications\\_files/0454\\_THE\\_INDIGENOUS\\_ORLD-2011\\_eb.pdf](http://www.iwgia.org/iwgia_files_publications_files/0454_THE_INDIGENOUS_ORLD-2011_eb.pdf).

28. *Id.* at 89-90.

29. See generally JOSÉ VASCONCELOS, *THE COSMIC RACE: A BILINGUAL EDITION* (Didier Tisdel Jaén trans., Johns Hopkins Univ. Press 1997) (1925).



of the world.<sup>30</sup> A further variation to the historically imprinted racial tracts or the visions of the “racial democracy” or “*raza cosmica*” originates from Venezuela where the term *café con leche* (coffee with milk) is used to underscore the belief that the racial intermingling has given rise to a racial democracy.<sup>31</sup> Distinct from the narratives of the nation that would seek denial, obliteration, or assimilation, there is a final variation of the place of the Indigenous “Other” in the nation—that of celebration. As described by Gina Cabarcas Macia, the enactment of the Colombian constitution in 1991 has given rise to circumstances such that “the cultural diversity’s recognition and exaltation of the Native Indians has become a key element in the reconstruction of our national identity.”<sup>32</sup> In these different approaches to the place of the Indigenous in the nation, there are in turn a multiplicity of intersecting identities and contradictions—both self-identified and externally imposed—that only lend to the complexity.

Since Wiessner offered his comments in 1999, it is clear from the breadth of subsequent scholarship that LatCrit has engaged substantially with Indigenous scholars and issues, a point made by Montoya and Valdes in citing, for example, the work of Native American academic Christine Zuni-Cruz.<sup>33</sup> This breadth of scholar-

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30. See generally James Diego Vigil & Felipe Lopez, *Race and Ethnic Relations in Mexico*, J. LATINO-LATIN AM. STUD., no. 2, Spring 2004, at 49-74.

31. See generally WINTHROP R. WRIGHT, *CAFÉ CON LECHE: RACE, CLASS, AND NATIONAL IMAGE IN VENEZUELA* (1990).

32. Gina Cabarcas Macia, *Language and Domination: The Word “Indian” and Its Use in the First Years of the Republic in Colombia*, 4 FLA. INT’L U. L. REV. 53 (2008).

33. Montoya & Valdes, *supra* note 14, at 1199. It is worth noting that Iglesias and Valdes expressed this same commitment some nine years earlier where they observed that LatCrit was a political decision to identify and build collaborations with other traditionally subordinated peoples and groups, including Indigenous People as part of the formation of a new discourse and praxis. Elizabeth M. Iglesias & Francisco Valdes, *Afterword: Religion, Gender, Sexuality, Race and Class in Coalitional Theory: A Critical and Self-Critical Analysis of LatCrit Social Justice Agendas*, 19 CHICANO-LATINO L. REV. 503, 568-71 (1998). Valdes also reiterated in 2009 that LatCrit’s concern with Indigenous issues and scholars had been relevant from the very genesis of the movement. Francisco Valdes, *Rebellious Knowledge Production, Academic Activism, & Outsider Democracy: From Principles to Practices in LatCrit Theory, 1995 to 2008*, 8 SEATTLE J. SOC. JUST. 131, 152 (2009).

ship can perhaps be attributed partly to the move beyond the national borders, a focus upon the United States, and partly to the emergence of scholarship from other Central and Latin American legal scholars (or indeed scholars from around the globe). It may also be a measure of the changing socioeconomic and juridical conditions in these nations. The possibility also should not be discounted that the original proposition of Wiessner inflated the significance of the omission of Indigenous Peoples from the bibliography and that the work was being done. Whatever the reasons, it is clear there is now a burgeoning canon of work under the aegis of LatCrit that demonstrates a commitment to dealing with Indigenous Peoples beyond the essentialisms that characterize so much of the juridical discourse, both historical and contemporary. Against this canvas of violence (both past and present), denial of the existence of Indigenous communities, and the complexities of multiple identities, the contributions to of this cluster of essays exemplify the possibilities (and obligations) of LatCrit scholarship to, as Montoya and Valdes urge, achieve social justice and disseminate subordinated knowledges.

### III. INTERNATIONAL LAW, NARRATIVES OF DISPOSSESSION, AND THE INDIGENOUS

As noted above, the promulgation of the doctrines of discovery and *terra nullius* were grounded in the representation of Indigenous populations as savages who could never be in possession of the land. An understanding of this juridical erasure is all the more pertinent in this century as Indigenous Peoples challenge the basis of their dispossession from traditional lands. The essay by Kim Benita Vera, *From Papal Bull to Racial Rule: Indians of the Americas, Race, and the Foundations of International Law*, represents an important contribution to an understanding of the gradual development of the justification for the dispossession of Indigenous Peoples by contrasting the writings of Vitoria and Grotius.<sup>34</sup> Building upon the groundbreaking work of Robert Williams,<sup>35</sup> Vera focuses upon the

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34. Kim Benita Vera, *From Papal Bull to Racial Rule: Indians of the Americas, Race, and the Foundations of International Law*, 42 CAL. W. INT'L L.J. 453 (2012).

35. ROBERT A. WILLIAMS, *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* 313 (1990).

manner in which the legitimacy of the appropriation of lands in the New World shifted from a religious authority (manifested in the issuance of papal bulls which effectively adjudicated competing land claims of the European Christian nations) to an authority that was grounded in an early form of secular international law (although still informed by the inherent correctness of the “civilizing mission” to be undertaken by nations, such that the waging of a just war in the name of faith could give rise to the claim). For Vitoria, the claim to discovery and occupancy did not give rise to a legitimate claim to the new lands, rather it had to be grounded in the waging of a “just war,” which served to retain at least in part the religious basis for claim to the new territories. Significantly, Vera observes that Grotius disagreed with the view of Vitoria, deeming that discovery and occupation alone could be sufficient for a claim to territory. Through an examination of tracts from Grotius that have previously been relatively neglected, Vera then reflects upon the deployment of race in the representation of Indigenous populations, going so far as to trace the descent of Native Americans from Ethiopia. The effect of race being inaugurated at the very beginnings of international law is then traced to its deployment in the 1823 decision of the United States Supreme Court in *Johnson v. McIntosh*,<sup>36</sup> which confirmed that claims by virtue of the doctrine of discovery were the exclusive preserve of European nations.

The *Johnson* decision confirmed the place of the Native American outside the embrace of the nation and simultaneously inscribed the significance of race and religion as determinants of personhood in the secular state. An understanding of how Indigenous identity can be reified as preliminary to the erasure of any juridical form or rights is crucial for the analysis of origins of the modern civic state and the contemporary claims for self-determination and sovereignty. Vera’s contribution adds to the body of LatCrit scholarship that includes Susan Scafidi<sup>37</sup> (engaging with the work of seventeenth-century Spanish jurist Juan de Solrzano Pereira to clarify Native American legal identity within the Spanish social order) and Ward Churchill<sup>38</sup>

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36. 21 U.S. 543 (1823).

37. See Susan Scafidi, *Old Law in the New World: Solórzano and the Analogical Construction of Legal Identity*, 55 FLA. L. REV. 191 (2003).

38. See Ward Churchill, *The Law Stood Squarely on Its Head: U.S. Legal*

(examining the evolution of the international law basis for the acquisition of territory and the decisions of the Supreme Court in *Johnson v. McIntosh* and the other cases in the so-called “Marshall trilogy”<sup>39</sup>).

#### IV. NATIONS, IDENTITIES, SEXUALITIES, AND THE INDIGENOUS “OTHER”

The remaining two essays in this cluster intersect with a number of issues relating to the writing of the Indigenous identity and its relationship with the nation, but also trace the discussions within Vera’s work insofar as they relate to the “writing” of the Indigenous object. Jessica A. Solyam and Bryan McKinley Jones Brayboy’s essay, *Memento Mori: Policing the Minds and Bodies of Indigenous Latinas/os in Arizona*,<sup>40</sup> examines Arizona House Bill 2281, which seeks to control and police the curriculum of the Mexican American Raza Studies programs. The rationale offered by Arizona politicians for refusing funding to these programs is that such programs are segregationist and racially divisive. In fact, Solyam and Brayboy argue that, following in a long line of measures that have targeted Latinos with respect to immigration issues, the House Bill is consistent with a plan to create a universal, individual American citizen. Conversely, the bodies of the brown/black racial “Other” can only ever be outsiders that are marked as criminal or illegal. In this way, Solyam and Brayboy’s work adds to the substantial body of LatCrit scholarship that engages the question of rights in the nation of Indigenous Latinas/os.<sup>41</sup> Implicit within the assimilationist project of

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*Doctrine, Indigenous Self-Determination and the Question of World Order*, 81 OR. L. REV. 663 (2002).

39. *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Worcester v. Georgia*, 31 U.S. 515 (1832), *abrogated by Nevada v. Hicks*, 533 U.S. 353 (2001).

40. Jessica A. Solyam & Bryan McKinley Jones Brayboy, *Memento Mori: Policing the Minds and Bodies of Indigenous Latinas/os in Arizona*, 42 CAL. W. INT’L L.J. 473 (2012).

41. See generally Maria Pabon Lopez, *The Phoenix Rises for El Cenizo: A Community Creates and Affirms a Latino/a Border Cultural Citizenship through its Language and Safe Haven Ordinances*, 78 DENV. U. L. REV. 1017 (2001); Kevin R. Johnson, *Immigration and Latino Identity*, 19 CHICANO-LATINO L. REV. 197 (1998); Kevin R. Johnson, “*Aliens*” and the U.S. Immigration Laws: *The Social and Legal Construction of Nonpersons*, 28 U MIAMI INTER-AM. L. REV. 263 (1997).

House Bill 2281 is the repudiation of any education in—or celebration of—the collective experience of Latinos/as and/or Mexicans and by extension, the confirmation that the universal subject who is the possessor of rights can only ever be white. The historical continuities that emerge in the colonial project are made explicit through Solyam and Brayboy's reference from Williams to the colonial project of the 1492 *Grammatica Castellana* of Elio Antonio de Nebrija in which it was argued that language was the “consort of empire” such that it would allow for control of (along with their bodies) the minds and knowledge of the colonized. The colonization of the mind that follows from these moments of what Skuttnab-Kangas has termed “linguistic genocide” were part of the colonial project and remain part of the daily experience of Indigenous Peoples around the globe.<sup>42</sup> More importantly, the passage of House Bill 2281 (and the related attacks upon bilingual education) can be seen as contemporary manifestations of this colonial violence. The devastation of Indigenous knowledge and beliefs serves to marginalize Indigenous Latinas/os in Arizona and deny their histories. More profoundly, the House Bill and similar measures are intended to erase any basis upon which a claim for self-determination could be established, while simultaneously ensuring that Latinos/as will not have access to the education to advance to any professional, highly-paid positions. The law is deployed to confirm the whiteness of the nation and the Latino/a citizen can only ever remain, as Solyam and Brayboy put it, “invisible in voice and presence.”

The contribution by Alfredo Mirandé in *The Muxes of Juchitán: A Preliminary Look at Transgender Identity and Acceptance*<sup>43</sup> also deals with a contemporary issue relating to the broader question of articulations of identity within Indigenous communities. By tracing the “coming out” and social acceptance of the group known as *los muxes* from El Istmo de Tehuantepec in Oaxaca, this essay builds upon the existing work in the LatCrit field that engages with intersectionality by opening up the consideration of racial or ethnic

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42. See generally TOVE SKUTTNABB-KANGAS, LINGUISTIC GENOCIDE IN EDUCATION—OR WORLDWIDE DIVERSITY AND HUMAN RIGHTS? (Lawrence Erlbaum Associates 2000).

43. Alfredo Mirandé, *The Muxes of Juchitán: A Preliminary Look at Transgender Identity and Acceptance*, 42 CAL. W. INT'L L.J. 509 (2012).

identities that take into account identities inflected by gender or sexuality.<sup>44</sup> The *muxes* are described by Mirandé as a third sex who comprise up to 6% of the male population of this locality and occupy a privileged place in the society, deemed to be the smartest and most gifted. The distinctive difference of the *muxes* means that they might dress as women, but do not view themselves as homosexual. Indeed, Mirandé notes that some *muxes* are married and have children, and some choose not to wear traditional Zapotec dress. Significantly, he observes that they are not subject to the discrimination encountered by gays in Oaxaca. Mirandé builds upon field notes that lead up to the great *Muxe Vela* (festival), which can be seen as an example of the LatCrit methodology of “counter storytelling,” offering an alternative narrative to the dominant discourse. Mirandé’s work challenges a number of the prevailing misconceptions (and mistranslations) relating to homosexuality in Indigenous Peoples but also makes clear the implications for social justice and acceptance for GLBT communities in the United States in detailing the nature of acceptance and celebration of the *muxes*. The essay thus offers not only an exploration of the violence of imposed historical narratives, but also an observation upon the complexity of Indigenous identity intersecting with sexuality. The *muxes* are a confirmation of the strength of Indigenous communities to assert their right to self-identify and to resist the attempts of the dominant culture to impose “the dominant cultures normative classification of who they should be.”<sup>45</sup> This strength can be traced to the determination to fight for the right to self-identity as a form of self-determination, which is also evident in the Latino/a Indigenous communities’ struggle in Arizona against the imposition of House Bill 2281.

## V. CONCLUSION

The stark reality of the global present is that too many Indigenous Peoples of the world still struggle against colonial modalities of

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44. See generally Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex,” “Gender,” and “Sexual Orientation” in Euro-American Law and Society*, 83 CALIF. L. REV. 1 (1995); Berta Esperanza Hernández-Truyol, *Latina Multidimensionality and Lat Crit Possibilities: Culture, Gender, and Sex*, 53 U. MIAMI L. REV. 811 (1999).

45. Sharon E. Rush, *Identity Matters*, 54 RUTGERS L. REV. 909, 911 (2002).

violence and death, labour exploitation, dispossession from their lands, and theft of their culture and traditional knowledge. In all of these sites of oppression, the law is all too often present, either as the instrument of the dispossession—validating and authorizing state action—or standing mute to the events that unfold, unable or unwilling to recognize the ethical and moral (if not legal) obligation to intervene. It is here that the LatCrit scholarship can be crucial. The multiplicities of identity and the complex nature of histories in Latin America undoubtedly make for a difficult path, yet it is surely time to reflect upon and engage with Ofelia Schutte’s identification of the need for “an ethical reconstruction of our identities as Latinas/os in such a way that the Latina/o identity embraces, rather than abjects, the [I]ndigenous [P]eoples’ struggles against institutions, structures, and policies that have oppressed them for centuries.”<sup>46</sup>

As a non-Indigenous scholar working with Indigenous Australians, who experience many of the same struggles as their brothers and sisters in Latin America and the United States, the words of Schutte ring no less true.

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46. Ofelia Schutte, *Indigenous Issues and the Ethics of Dialogue in LatCrit Theory*, 54 RUTGERS L. REV. 1021 (2002).

